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June 6, 2011

Honorable Viktor V. Pohorelsky
United States Magistrate Judge
United States District Court, Eastern District of New York
225 Cadman Plaza East
Brooklyn, N.Y. 11201

Re: Alex Bartoli v. City of New York, et al., Docket No.: 09 cv 4163 (JG)(VVP)

Dear Magistrate Judge Pohorelsky:

The plaintiff is in receipt of Defendants' CITY; RAYMOND FESTINO; and STEVEN CSAKANY'S motion seeking a protective order precluding the taking of Captains Terrance Moore and Daniel Micklas's depositions as well as the Rule 30(b)(6) witnesses. The Court should disregard Defendants' motion as simply duplicative of the same argument advanced the last time before the court.[1] Plaintiff has been consistent throughout this litigation, the scope of the Rule 30(b)(6) inquiry continues from his assignment to Police Service Area No.: 2, in 2002, until his retirement. For the reasons set forth below, this motion must be denied in its entirety.

Pursuant to Rule 26(b) of the Federal Rules of Civil Procedure, a party "may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." Fed.R.Civ.P. 26(b)(1). Any party to a civil action ordinarily will be able to take the deposition of any person, including a party, at least in the absence of a protective order entered pursuant to Fed. R.Civ.P. 26(c).[2] However, Rule 26(c) states that the Court "may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense." Fed.R.Civ.P. 26(c). "[T]he burden is upon the party seeking non-disclosure or a protective order to show good cause." *See* Dove v. Atlantic Capital Corp., 963 F.2d 15, 19 (2d Cir.1992) (citations omitted). "Under Rule 26(c), the trial court has 'broad discretion ... to decide when a protective order is appropriate and what degree of protection is required.' " *See* Duling v. Gristede's Operating Corp., 266 F.R.D. 66, 72 (S.D.N.Y.2010) (quoting Seattle Times Co. v. Rhinehart, 467 U.S. 20, 36, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984)).

[1] See the Court's ruling in a similar matter Delgado v. The City of New York, et al., 09 cv 2544, where the Court ruled that plaintiff is entitled to reach back because information gathered may lead to evidence admissible at trial.
[2] Fed.R.Civ.P. 30(a).

Generally, high ranking government officials are not subject to depositions. *See* Marisol A. v. Guiliani, No. 95-CV-10533, 1998 WL 132810, at *3 (S.D.N.Y. Mar. 23, 1998) (citing National Nutritional Foods Ass'n v. F.D.A., 491 F.2d 1141, 1144-46 (2d Cir.), cert. denied, 419 U.S. 874 (1974). High ranking government officials are granted this limited immunity from being deposed "when they have no personal knowledge to ensure that they have the time to dedicate to the performance of their governmental functions." *See* Marisol A., 1998 WL 132810, at *3 (citing Warzon v. Drew, 155 F.R.D. 183, 185 (E.D.Wis.1994)). The policy surrounding this privilege is to allow the function and flow of government to proceed unabated. *See* Capitol Vending Co. v. Baker, 36 F.R.D. 45, 46 (D.D.C.1964); Church of Scientology v. I.R.S., 138 F.R.D. 9, 12 (D.Mass.1990).

However, "depositions of high level government officials are permitted upon a showing that: (1) the deposition is necessary in order to obtain relevant information that cannot be obtained from any other source and (2) the deposition would not significantly interfere with the ability of the official to perform his governmental duties." *See* Toussie v. County of Suffolk, No. 05-CV-1814, 2006 WL 1982687, at *1 (E.D.N.Y. July 13, 2006) (citing Marisol A., 1998 WL 132810, at *2); *see* also Martin v. Valley Nat'l Bank, 140 F.R.D. 291, 314 (S.D.N.Y.1991). Where the government official was personally involved in the event(s) giving rise to the litigation, courts have directed such depositions to go forward. *See* Lederman v. Giuliani, No. 98-CV-2024, 2002 WL 31357810, at 1 (S.D.N.Y. Oct. 17, 2002); Gibson v. Carmody, No. 89-CV-5358, 1991 WL 161087, at 1 (S.D.N.Y. Aug. 14, 1991).

Here, Defendants' CITY; RAYMOND FESTINO; and STEVEN CSAKANY seek to preclude plaintiff from investigating his allegations of racial discrimination. Defendants' argue that Captains Terrance Moore and Daniel Micklas's SOLE alleged involvement in this matter concerns the 2004 Internal Affairs investigation regarding plaintiff allegedly using anabolic steroids. Further, arguing that these allegations are time-barred and for that fact are irrelevant. Additionally, Defendants' argue that the Rule 30(b)(6) witnesses regarding how the Department handles Internal Affairs investigations regarding alleged anabolic steroid usage within IAB and the medical division are also time-barred and for that fact irrelevant. Defendants' argue that the Rule 30(b)(6) witness regarding the handling of OEEO[3] matters regarding race discrimination is also irrelevant. Plaintiff argues that Defendants' arguments are in direct conflict with Toussie and Lederman and Gibson, as well as the Federal Rules of Civil Procedure, certainly designed to further preclude him from challenging their decision making.

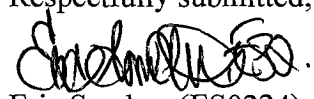
Plaintiff argues that the depositions of Captains Terrace Moore and Daniel Micklas as well as the Rule 30(b)(6) witnesses are timely as supported by the Court's ruling regarding hostile work environment. The theory of plaintiff's case is racial stereotyping. Plaintiff needs to depose the aforementioned witnesses because the relevant information cannot be obtained from any other source and these depositions would not significantly interfere with their ability to

[3] The OEEO procedure described by Defendants' is inaccurate. The NYPD established its own OEEO by interim Order No.: 40 on September 27, 1978, codified into Patrol Guide Section Nos.: 205-36 and 205-38. These policies clarifies and reinforces a supervisor's duties and responsibilities to report all EEO complaints, including complaints of retaliation for having filed or assisted in the investigation of an EEO complaint, to OEEO, and more clearly defines the obligation of members of the service to maintain a bias-free work environment. Plaintiff is alleging that the supervisors and OEEO failed to follow NYPD policy regarding OEEO related allegations.

perform their governmental duties. Plaintiff has offered to hold the depositions at the New York City Law Department to make it convenient for the witnesses. Captains Terrance Moore and Daniel Micklas are the only persons who can discuss the reasoning behind each one of their personal decisions related to the plaintiff regarding the anabolic steroid investigation in 2004. The Rule 30(b)(6) witnesses can discuss from the Department's perspective the relevant policies regarding investigating alleged anabolic steroid usage as well as investigating allegations of racial stereotyping. Plaintiff further argues that based upon Captains Terrance Moore and Daniel Micklas's recommendations, the Police Commissioner used his statutory authority under New York City Administrative Code § 14-115, to change his duty status from full to modified and cause him to defend himself against formal disciplinary charges in the Trial Room. It is important to note, that Defendants' do not offer any sworn affidavit to the contrary that these witnesses were not directly involved in the decision making process or cannot shed light about the facts and circumstances surrounding plaintiff's allegations. These witnesses presumably can provide information that could lead to admissible evidence to support plaintiff's claims for race discrimination. Presumably, if the plaintiff can establish through these witnesses that they either created special workplace rules to evaluate plaintiff as an employee, meaning that he was treated differently and/or they failed to follow clearly established workplace rules regarding investigating anabolic steroid usage, including investigating his allegations of racial stereotyping, then plaintiff would be able to not only establish a prima facie case but, establish issues of fact that can only be resolved by a jury thereby precluding summary judgment.

Therefore, the Court must deny Defendants' motion in its entirety.

Respectfully submitted,



Eric Sanders (ES0224)

ES/es

**Exhibit 1**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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LUIS DELGADO,

Plaintiff,

- v -

THE CITY OF NEW YORK, et al.,

Defendants.

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**ORDER**

CV-09-2544 (BMC)(VVP)

The defendants have moved for two items of discovery relief, a protective order limiting the scope of a deposition noticed by the plaintiff pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure and an order permitting the defendants to substitute a witness in the place of three other witnesses noticed for depositions by the plaintiff. As set forth below, the motion is granted in part and denied in part.

As to the Rule 30(b)(6) deposition, the defendants need not produce a witness for testimony on Management Information Systems as the plaintiff has not explained how testimony about that subject is likely to lead to evidence admissible at trial. The defendants also need not produce a witness to provide testimony regarding the handling by the Office of Equal Employment Opportunity of "investigations of members of the service accused of criminal offenses and/or serious misconduct involving sex offenses" if an affidavit by the director or other high official of that Office confirms counsel's statement that the Office does not handle such investigations. As to the other two subjects about which the defendants have sought limitations, itemized as Subject Matter Nos. 2 and 3 in the defendants' letter motion, the defendants' objection that the request for testimony about those subjects is overly broad as to time is rejected. Although the Internal Affairs Bureau

("IAB") investigation was instituted prior to the apparently applicable limitations period, the investigation and prosecution of the disciplinary proceedings against the plaintiff did not terminate until a point that falls within the limitations period. The court may ultimately determine that the entire investigation constitutes continuing discrimination that would be actionable notwithstanding that some of the allegedly discriminatory conduct occurred outside the limitations period.[1] Thus, the request for testimony reaching back to January 1, 2003 with respect to the IAB investigation may well lead to evidence admissible at trial. As to testimony about Employee Management Division policies and procedures concerning the matters identified in the notice, the defendants need not provide a witness with knowledge about all the matters identified reaching back to January 1, 2003. Rather, the defendants must produce a witness (or witnesses) who can testify about each of the subjects for a period dating back from the present to one year prior to the point when the plaintiff alleges in the amended complaint that he was subject to a decision involving each of the matters identified. For example, the plaintiff alleges in paragraph 70 that he was placed on Level III Special Monitoring "some time in 2007." Thus, as to that subject, the defendants must produce a witness to testify about Level III Special Monitoring from June 2006 to the present.

As to the application to substitute a witness to testify in place of three other witnesses noticed by the plaintiff, the plaintiff asserts that each of the witnesses had personal involvement in decisions alleged by the plaintiff to have been taken with discriminatory

[1]I emphasize that this decision is *not* a determination that the investigation and prosecution actually *do* constitute continuing discrimination. Rather, this decision simply recognizes that such a determination *could* be made by the court when the issue is ripe for decision.

intent, and points out that the defendants have offered no affidavits by those witnesses that they had no personal involvement in any of the decisions concerning the terms and conditions of the plaintiff's employment and treatment about which he complains. In the absence of any such affidavits, the court has no basis to deny the plaintiff the opportunity to depose the witnesses. Accordingly, the request to substitute another witness in their place must be denied.

**SO ORDERED:**

*Viktor V. Pohorelsky*

VIKTOR V. POHORELSKY
United States Magistrate Judge

Dated: Brooklyn, New York
April 27, 2011